SUSHI KITCHEN GROUP SDN BHD & ANOR v. GOH HOOI CHEEN

HIGH COURT MALAYA, KUALA LUMPUR
AZLAN SULAIMAN JC
[CIVIL SUIT NO: WA-22IP-26-04-2021]
30 NOVEMBER 2023

Abstract – *Under O. 45 r. 7(4) of the Rules of Court 2012, the requirement to endorse a penal notice on a consent judgment which pertains to an order requiring a person to do an act is mandatory. If an applicant in an application for committal proceedings fails to endorse as such, the said application would be dismissed by the court.*

CIVIL PROCEDURE: *Committal proceedings – Application for – Failure to comply with consent judgment – Allegation that restaurant owner failed to place signage bearing terms agreed between parties continuously and contentiously in her restaurant – Whether requirement for personal service under O. 45 r. 7(2)(a) of Rules of Court 2012 ('ROC') could be dispensed with – Whether consent judgment in respect of order requiring person to abstain from doing act or to do act – Whether requirement of endorsing penal notice on consent judgment under O. 45 r. 7(4) of ROC could be dispensed with – Whether court could exercise inherent power under O. 92 r. 4 of ROC to dispense requirement of endorsing penal notice on consent judgment – Whether affidavits verifying facts known to restaurant owner could be affirmed by her solicitors*

The second plaintiff and defendant were close friends. They worked together in a restaurant founded by the first and second plaintiffs. However, disputes and differences arose between the two, and it became deeply fractured after the defendant left her employment with the first plaintiff and started her own restaurant in Penang. After the setting up of the new restaurant, there was an allegation that the defendant had infringed the intellectual property rights of the plaintiffs. Hence, an action was instituted against the defendant. Regarding this action, after a successful mediation, the parties recorded a consent judgment. Among the terms agreed by the parties was that the defendant would place a signage bearing, among others, the history of the founding of the first plaintiff together with other terms as agreed by the parties with a qualification that the same would not contain any matters that could cause any admission of liabilities from either party, conspicuously and continuously, in the defendant's restaurant ('signage term'). However, subsequently, as alleged by the plaintiffs, the defendant failed to adhere to the signage term. This prompted the plaintiffs to initiate an *ex parte* application under O. 52 r. 3 of the Rules of Court 2012 ('ROC') against the

defendant for leave to apply an order of committal ('leave application'). The leave application was subsequently allowed by the court ('leave order'), hence, the plaintiffs applied for an order of committal against the defendant, for the same to give effect to the signage term ('committal application'). In resisting the committal application, other than contending that she had adhered to the signage term, the defendant also applied to set aside the leave order ('defendant's application'). As a support to her application, the defendant raised the following issues on procedural/technical grounds: (i) the consent judgment had not been personally served on her but to her solicitors, therefore, the plaintiffs had not fulfilled the requirement under O. 45 r. 7(2)(a) of the ROC; (ii) the consent judgment had not been endorsed with a penal notice under O. 45 r. 7(4) of the ROC; and (iii) the three affidavits in support of the plaintiffs' application which culminated in the leave order were affirmed by the plaintiffs' counsel, who had no personal knowledge on the matters deposed to.

Held (allowing defendant's application with costs):

(1) In arguing that the requirement for personal service under O. 45 r. 7(2)(a) could be dispensed with, the plaintiffs invoked O. 45 r. 7(6) of the ROC. However, the applicable provision was O. 45 r. 7(7) of the ROC, which allows personal service of a judgment or order to be dispensed with if the court thinks it is just to do so. The said rule is not only restricted to judgments or orders requiring a person to abstain from doing an act, but it also extends to and covers judgments or orders requiring a person to do an act. The question was then, whether on the facts and circumstances, the court thinks it is just to dispense with that personal service. In the present case, firstly, it had been shown that the defendant had full knowledge of the consent judgment and its terms. Secondly, when the consent judgment was served on the defendant's solicitors, there was no objection from either the defendant or her solicitors. And the defendant had gone on to carry out what she believed and insisted were acts that complied with the signage term. Therefore, it would be wholly unjust to the plaintiffs to allow the defendant to belatedly object to the service of the consent judgment on her solicitors and insist for personal service when she knew and was personally involved in the formulation of the consent judgment, agreed to the terms and contents of the signage that was to be displayed in her restaurant, and then carried out acts which she alleged complied with the signage term. As it was just, there was no hesitation for the discretion under O. 45 r. 7(7) of the ROC to be invoked. The first issue was therefore dismissed. (paras 17-25)

(2) On the second issue, the defendant was favoured over the plantiffs for several reasons. This included, while O. 45 rr. 7(6) and 7(7) of the ROC expressly provide for situations in which service of the order or judgment may be dispensed with in prelude to committal proceedings, there are no corresponding provisions to dispense with the penal notice required by O. 45 r. 7(4) of the ROC. Other than that, as per *Loh Eng Leong & Anor v. Lo Mun Sen & Sons Sdn Bhd & Anor*, it was held that the penal notice was mandatory and the absence of one was fatal to the committal proceedings. Further, none of the three cases the plaintiffs relied on, *ie*, *Saraswathy Kandasami v. Datuk Saravanan Murugan & Another Appeal, Dewan Perniagaan Melayu, Malaysia, Negeri Johor v. Menteri Besar Johor & Ors* and *Plastech Industrial Systems Sdn Bhd v. N&C Resources Sdn Bhd & Ors*, had held that the endorsement of penal notice on an order or judgment requiring an act to be done can be dispensed with. (paras 31-34)

(3) The purpose of a penal notice is to warn a defendant of the consequences of non-compliance with the terms of the order or judgment against him. Even though the defendant was present in court when the consent judgment was drawn up and pronounced, it was not endorsed with any notice under O. 45 r. 7(4) of the ROC. While the defendant certainly knew of the consent judgment, there was no evidence that she knew of or had been given any written notice of the consequences of non-compliance with the terms of the order or judgment. The plaintiffs or their solicitors had never insisted on including a penal notice in the consent judgment when it was negotiated, agreed upon, drawn up, pronounced in court, and then sealed. The defendant had also never been given any notice by the plaintiffs that, if she neglected to obey the consent judgment, she would be liable to a process of execution for the purpose of compelling her to, including committal proceedings. Therefore, considering these and that a penal notice is mandatory and could not be dispensed with for judgments or orders requiring an act to be done, the consent judgment could not be enforced by way of committal for as long as it did not contain a penal notice. The leave order was hence dismissed. (paras 39, 41, 51 & 52)

(4) Although the plaintiffs urged for the exercise of the inherent powers under O. 92 r. 4 of the ROC to dispense with the penal notice, such power could not be exercised here. This was because, the inherent powers could only be invoked when there is a *lacuna* in the ROC. In the present case, there is no *lacuna* in the ROC. The provisions of the ROC only allow dispensation of service of a judgment or order provided that the circumstances are met, but not the endorsement of a penal notice under O. 45 r. 7(4) of the ROC. (paras 42-48)

(5) Given the serious nature and consequences of committal proceedings and that the affidavit filed under O. 52 r. 3 of the ROC is for the deponent to verify facts which he is able of his known knowledge to prove, the plaintiff's counsel should not have affirmed the affidavits in support of the leave application. The task should have been left to the plaintiffs themselves, more so when the alleged non-compliance with the consent judgment took place in Penang and was for putting up a signage continuously for 12 months. Whether or not the signage term had been complied with was something that the plaintiffs had to depose and verify, not their counsel. Further, under O. 38 r. 2 of the ROC, a deponent of an affidavit may be cross-examined on that affidavit. That possibility was a further reason for counsel and solicitors for the party not to affirm contentious affidavits on behalf of their clients. Consequently, the defendant's application was allowed, and the committal application was dismissed with liberty to file afresh, with costs of RM8,000. (paras 59-61 & 63-65)

Case(s) referred to:

Allport Alfred James v. Wong Soon Lan [1989] 1 CLJ 271; [1989] 2 CLJ (Rep) 852 ***(refd)***

Dewan Perniagaan Melayu, Malaysia, Negeri Johor v. Menteri Besar Johor & Ors [2016] 1 CLJ 52 HC ***(refd)***

Loh Eng Leong & Anor v. Lo Mun Sen & Sons Sdn Bhd & Anor [2003] 4 CLJ 743 CA ***(refd)***

Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors [1985] 1 CLJ 181; [1985] CLJ (Rep) 575 HC ***(refd)***

Pacific Inter-Link Sdn Bhd v. Pemilik Kapal Atau Vesel "Makatsarija" [2000] 2 CLJ 679 HC ***(refd)***

Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC ***(refd)***

Plastech Industrial Systems Sdn Bhd v. N&C Resources Sdn Bhd & Ors [2013] 9 CLJ 404 HC ***(refd)***

Samsung Corp v. Chinese Chamber Realty Pte Ltd [2004] 1 SLR (R) 382 ***(refd)***

Saraswathy Kandasami v. Datuk Saravanan Murugan & Another Appeal [2022] 2 CLJ 202 CA ***(refd)***

Sykt Perumahan Pegawai Kerajaan Sdn Bhd v. Sri Komakmur Sdn Bhd (2) [1998] 3 CLJ 841 HC ***(refd)***

Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd [1996] 2 BLJ 142 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 1 r. 7, O. 38 r. 2, O. 41 r. 5(1), O. 45 rr. 5(1)(a), 7(2)(a), (4)(a), (6), (7), O. 52 r. 3, O. 92 r. 4

For the plaintiffs - Gan Jer Nynn & Eshter Hor Su Ying; M/s Paul Cheah Assocs
For the defendant - Maggie Khon & Chong Xin Tian; M/s CP Khon & Assocs

Reported by Syamim Ariffin

JUDGMENT

Azlan Sulaiman JC:

Introduction

[1] Just over a year ago now, on 11 November 2022, after a successful mediation, the parties recorded a penghakiman persetujuan ("consent judgment") in this action for alleged infringement by the defendant of the plaintiffs' intellectual property rights.

[2] For many years before that, the second plaintiff and the defendant had been close friends and colleagues in the same restaurant, the first plaintiff, that the second plaintiff had founded. Disputes and differences between them that probably arose before but certainly after the defendant left the plaintiff's restaurant and set up her own restaurant in Penang had fractured and caused deep fissures to their friendship. This action exacerbated that divide. The hope was that the consent judgment would halt that downward slide and be the foundation of a truce, reconciliation and forgiveness, and perhaps a revival of their earlier amity.

[3] But it was not to be. That hope proved to be short-lived when the plaintiffs filed an *ex parte* application on 28 March 2023 under O. 52 r. 3 of the Rules of Court 2012 ("Rules") for leave to make an application for an order of committal against the defendant for her alleged breach of the consent judgment.

[4] On 27 July 2023, an order was made giving the plaintiffs that leave ("leave order"), and they filed the application for committal on 9 August 2023 ("committal application"). Apart from challenging the committal application, to strike at the heart of it the defendant is applying to set aside the leave order ("defendant's application"). If the defendant's application is allowed, it will spell the end of the committal application. This judgment is on that defendant's application.

The Alleged Breach Of The Consent Judgment And The Grounds For The Defendant's Application

[5] The committal application is premised on the defendant's alleged breach of just one term of the consent judgment, that required the defendant to put up a particular signage in her restaurant in Penang ("signage term"). That signage term reads:

> Defendan bersetuju untuk memaparkan kenyataan ringkas tentang sejarah dan penciptaan jenama "SUSHI KITCHEN", dengan terma-terma yang dipersetujui bersama oleh kedua-dua pihak ("**Kenyataan**"), bersaiz tidak kurang daripada 1 meter x 1 meter bagi tempeh 12 bulan dari tarikh persetujuan terma-terma oleh Plaintif-Plaintif dan Defendan di

A restoran Defendan yang beralamat di 12 Gat Lebuh Acheh, 10300 Georgetown, Pulau Pinang, Malaysia ("**Restoran Defendan**"), dengan syarat bahawa Kenyataan tersebut tidak mengandungi apa-apa perkara yang boleh menyebabkan pengakuan liabiliti-liabiliti pada Plaintif-Plaintif dan Defendan.

(emphasis added)

B The plaintiffs' allegation is that the defendant did not put up the sign continuously and in a conspicuous place in her restaurant.

[6] In opposing the committal application, the defendant contends that she has complied with this signage term. In applying to set aside the leave order, C she contends the same, and further raises three procedural/technical grounds to set aside the leave order:

(i) the consent judgment was not personally served on her under O. 45 r. 7(2)(a) of the Rules;

D (ii) the consent judgment was not endorsed with the notice under O. 45 r. 7(4) of the Rules; and

(iii) the three affidavits in support of the plaintiff's application for leave (collectively. "counsel's affidavits") which culminated in the leave order were affirmed by the plaintiffs' counsel, who had no personal E knowledge of the matters deposed to.

[7] Whether or not the defendant has complied with or breached the signage term of the consent judgment is an issue to be decided in the disposal of the committal application. Thus, this judgment will address those three procedural/technical grounds.

F

Ground 1: The Consent Judgment Was Not Personally Served

[8] The signage term involved an act that the defendant was required to do, as opposed to something which the defendant was to abstain from doing. In that respect, the signage term was in essence a mandatory order.

G **[9]** Order 45 of the Rules is entitled "enforcement of judgments and orders". Rule 5 of O. 45 is entitled "enforcement of judgment to do or abstain from doing an act." Sub-rule (1)(a) of r. 5 concerns judgments or orders for doing an act within a specified time, and sub-r. (b) is in relation to judgments or orders to abstain from doing an act. Thus, here we are concerned with H sub-r. (1)(a). Further, sub-r. (A) is for where a plaintiff wishes to enforce the judgment or order following that failure to comply by way of an order of committal.

[10] Bringing all of that together, O. 45 r. 5(1)(a) read with sub-r. (A) of the Rules provides:

I

Where – a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or

abridged under O. 3 rule 5, then, subject to these Rules, the judgment or order may be enforced by, with the leave of the Court, an order of committal.

[11] To be read in conjunction with that is O. 45 r. 7(2)(a) of the Rules, which provides:

Subject to O. 26, rule 7(3), and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless-(a) a copy of the order had been served personally on the person required to do or abstain from doing the act in question.

[12] The provisions for committal proceedings are encompassed in O. 52 of the Rules, aptly entitled "committal". Thus, according to O. 45 r. 7(2)(a) committal proceedings under O. 52 of the Rules are to be preceded by service of a copy of the order or judgment personally on the alleged contemnor.

[13] Here, the consent judgment was served on the defendant's solicitors and not on her personally. The plaintiffs do not dispute that. The defendant therefore contends that the plaintiffs have failed to comply with O. 45 r. 7(2)(a) of the Rules, and that, by their non-compliance with this essential prerequisite to commencing committal proceedings against her, the leave order should be set aside.

[14] The plaintiffs' riposte to that contention is that O. 45 r. 7(2)(a) of the Rules is a not a stand-alone provision and is not the be all and end all in regard to personal service of a judgment or order prior to enforcement by committal. Under the "paras. (6) and (7) of this rule" that it expressly mentions, personal service of the order or judgment can be dispensed with. These provide:

(6) An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either-

(a) by being present when the order was made; or

(b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.

(7) Without prejudice to its power under O. 62, rule 5, the court may dispense with service of a copy of an order under this rule if it thinks it just to do so.

[15] Under the first, *ie*, O. 45 r. 7(6) of the Rules, personal service of a judgment or order requiring a person to abstain from doing an act can be dispensed with in two instances:

(i) if he/she was present when the judgment or order was made; or

(ii) if he/she has been notified of the terms of the judgment or order.

Both essentially mean that personal service can be dispensed with where it can be shown that the defendant knew of the order or judgment and of its terms.

[16] I find that the defendant knew of the consent order and the signage term:

(i) she was present in person for the mediation and during the discussions when that signage terms was broached, discussed, formulated and agreed upon;

(ii) the consent judgment with the signage term was then immediately drawn-up, signed off by the parties' respective solicitors, and pronounced the same day in open court in her presence;

(iii) the consent judgment required that the terms and content of the sign to be displayed in her restaurant pursuant to the signage term were to be agreed upon between the parties. By a letter dated 13 February 2023, her solicitors informed the plaintiffs' solicitors that she had carried out the signage terms by 7 February 2023. That confirmation by the defendant's solicitors could only have been on the defendant's instructions; and

(iv) that confirmation, and the fact that the defendant contests the committal application by contending that she has complied with that signage terms necessarily means that she obviously she knew of the signage terms, had been notified of it, and had further reached a consensus with the plaintiffs on the terms and content of the sign to be displayed in her restaurant in accordance with the signage terms.

[17] Nevertheless, I find that O. 45 r. 7(6) of the Rules does not apply here and therefore, does not assist the plaintiffs. That provision expressly states that it relates to "An order requiring a person to abstain from doing an act". If it was meant to also apply to orders or judgments that require a person to do an act, then it would not have made that qualification or distinction.

[18] The signage terms was not a term in the consent judgment that required the defendant to abstain from doing an act; it was a term mandating her to carry out the act of displaying the sign in her restaurant.

[19] Moving on to O. 45 r. 7(7) of the Rules. This provision allows personal service of a judgment or order to be dispensed with if the court thinks it is just to do so. In my view, unlike r. 7(6), it is not just restricted to judgments or orders requiring a person to abstain from doing an act, but extends to and covers judgments or orders requiring a person to do an act. This is because it expressly says "under this rule", *ie*, rule 7 of O. 45. Rule 7 is entitled "service of copy of judgment or order prerequisite to enforcement under r. 5."

In turn, r. 5 is entitled "enforcement of judgment to do or abstain from doing an act." Both to do and to abstain from doing.

[20] Thus, I find that the plaintiffs can invoke O. 45 r. 7(7) of the Rules to seek a dispensation of personal service of the consent judgment on the defendant. The question then is whether on the facts and circumstances the court thinks it just to dispense with that personal service.

[21] In my view it is. Firstly, for the reasons I had set out earlier in para. 16, the defendant had full knowledge of the consent judgment and its terms.

[22] Secondly, when the consent judgment was served on the defendant's solicitors, there was no objection from either the defendant or her solicitors to that. Until now. And, despite not being personally served with it, the defendant had still gone on to carry out what she believes and insists were acts that complied with the signage terms in the consent judgment.

[23] The question of "just" necessarily involves balancing the positions of the competing parties. In my view, it would be wholly unjust to the plaintiffs to allow the defendant to belatedly object to service of the consent judgment on her solicitors and insist on personal service on her person when she knew of and was personally involved in the formulation of the consent judgment, agreed to the terms and content of the sign that was to be displayed in her restaurant, and then carried out acts which she alleges complies with the signage terms in the consent judgment.

[24] I therefore have no hesitation in invoking the discretion invested in this court under O. 45 r. 7(7) of the Rules to dispense with personal service of a copy of the consent judgment on the defendant, on the ground that I find that it is just to do so in this case.

[25] Accordingly, I dismiss the defendant's contention that the leave order should be dismissed because the consent judgment was not served personally on her.

Ground 2: No Notice On The Consent Judgment

[26] Order 45 r. 7(4)(a) of the Rules provides:

> There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served-in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it.

This provision clearly applies to orders and judgments of both persuasion, to do an act and to abstain from doing an act.

[27] "Form 83" refers to that of Appendix A to the Rules, and is commonly referred to as a penal notice. Order 1 r. 7 of the Rules provides:

> The Forms in Appendix A shall be used where applicable with such variations as the circumstances of the particular case require.

[28] Form 83 of Appendix A provides for three types of penal notice, use and application dependent on the relevant scenario. It is the first, (a), which is relevant here. It is in the following terms:

> In the case of a judgment or order requiring a person or body corporate to do an act within a specified time:
>
> > "If you, the within-named ... (or ...) neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same."

[29] The consent judgment was not endorsed with any penal notice. The defendant therefore contends that, as the plaintiffs have failed to comply altogether with O. 45 r. 7(4), which is also an essential prerequisite to commencing committal proceedings against her, the leave order should be set aside.

[30] In their written submissions, the plaintiffs argue that, just like service of the consent judgment and for the same reasons that I have now summarised in para. 16 of this judgment, this court should also dispense with the need for the consent judgment to be endorsed with a penal notice. For that, they rely on the following cases:

(i) *Saraswathy Kandasami v. Datuk Saravanan Murugan & Another Appeal* [2022] 2 CLJ 202;

(ii) *Dewan Perniagaan Melayu, Malaysia, Negeri Johor v. Menteri Besar Johor & Ors* [2016] 1 CLJ 52; [2016] 7 MLJ 1;

(iii) *Plastech Industrial Systems Sdn Bhd v. N&C Resources Sdn Bhd & Ors* [2013] 9 CLJ 404; [2013] 10 MLJ 837; and

[31] On this issue, I find in favour of the defendant over the plaintiffs, for several reasons.

[32] Firstly, while rr. 7(6) and 7(7) of O. 45 of the Rules expressly provide for situations in which service of the order or judgment may be dispensed with in prelude to committal proceedings, there are no corresponding provisions to dispense with the penal notice required by O. 45 r. 7(4) of the Rules.

[33] Secondly, in *Loh Eng Leong & Anor v. Lo Mun Sen & Sons Sdn Bhd & Anor* [2003] 4 CLJ 743; [2003] 4 MLJ 284, the Court of Appeal held that the penal notice was mandatory and the absence of one was fatal to the committal proceedings. At pp. 746 and 750 (CLJ); pp. 287f and 290i (MLJ) of the judgment, Augustine Paul JCA said:

> It is true, as contended by learned counsel for the appellants, that a failure to indorse the order of court with a penal notice is fatal to an application for committal.
>
> It is therefore clear that where an order of court to do an act must specify the time within which an act is to be done then such time must be specified. It is only in such cases that there can be indorsement with the penal notice. As the indorsement with the penal notice is a prerequisite to the making of a committal order which involves the liberty of the subject it is particularly important that the relevant rules are duly complied with.

[34] Thirdly, in none of the three cases that the plaintiffs rely on did the court hold that the endorsement of the penal notice on an order or judgement requiring an act to be done can be dispensed with.

[35] *Saraswathy Kandasami* involved the commencement of committal proceedings before the order had been sealed and served on the defendant, and did not involve the issue of non-endorsement of a penal notice on the order.

[36] In *Dewan Perniagaan Melayu Malaysia Negeri Johor*, Nazlan JC (now JCA) referred to *Allport Alfred James v. Wong Soon Lan* [1989] 1 CLJ 271; [1989] 2 CLJ (Rep) 852; [1989] 1 MLJ 338 and said that "the defect in not complying with the indorsement of a penal notice was ruled not fatal so long as the defendant had knowledge of the order in question." However, *Allport Alfred James* involved non-compliance with an *ex parte* order that was served personally on the respondent restraining him from disposing of the proceeds of sale of their matrimonial property. The nature of the order was to abstain from doing an act, and not to do an act. In his judgment, Chao Hock Tin JC drew a distinction between distinction between a prohibitory injunction and a mandatory injunction. He said:

> The court's powers to punish any person for civil contempt are quasi-criminal in nature. Where there is prescribed any procedural step to the exercise of that jurisdiction, that rule should be scrupulously observed and strictly complied with. From r. 7(4) and (6) of the RSC cited above, it is clear that the distinction between a prohibitory injunction and a mandatory injunction lies in the fact that enforcement of a prohibitory injunction may be effected even though personal service of the order has not been effected provided that the person against whom the injunction is made has notice of it. For a mandatory injunction personal service must be effected before enforcement may be taken. I do not think anything more should be read into r. 7(6). It can in no way be interpreted to excuse the non-compliance of the requirement of the indorsement of a penal notice.
>
> The rationale for the enforcement of a prohibitory injunction notwithstanding that the order has not been served is clear. It is basically to prevent a party who knew of the order made against him to act contrary

to it before the order is served on him. On the other hand, the rationale for a penal notice is to ensure that the person against whom the order is made fully appreciates the consequences of any noncompliance. This point did not arise and was not considered in *United Telephone Co* [1884] 25 Ch D 778. In my opinion, the omission to indorse the penal notice on the order served on the respondent is fatal.

[37] That same distinction was made by Kamalanathan Ratnam JC in *Sykt Perumahan Pegawai Kerajaan Sdn Bhd v. Sri Komakmur Sdn Bhd (2)* [1998] 3 CLJ 841; [1998] 5 MLJ 756. He said:

> Pursuant to O. 45 r. 7(3)(b), an order requiring a body corporate to do an act shall not be enforced unless the copy has been so served before the expiration of the time within which the body was required to do the act. Sub-rule (4) says that there must be an indorsement on the copy of an order served under this rule, that is a notice in Form 87 informing the person on whom the copy is served as and is required by sub-r. 4(b) that if the body corporate neglects to obey the order within the time so specified or, If the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it. These are mandatory requirements, a breach of which will render any application to commit, impotent.
>
> Pursuant to sub-r. (5), the copy of the order required to be served under this rule must be served on the person required to do the act. However, pursuant to sub-r. (6) where the person to be served with the order is required to abstain from doing an act, he need not be served personally with the order nor need there be a penal notice indorsed on the order provided the court is satisfied that he has notice of the order either by being present when the order was made or by being notified of the terms of the order, whether by telephone, telegram or otherwise.
>
> There is a clear distinction between a body corporate or an individual, having to do an act, and abstaining from doing an act. In the case before me, the defendant was required to specifically perform the contract within 30 days to remove the squatters. Clearly, the mandatory requirement of the need to indorse the punitive sanction in the order has to be complied with. The reason is obvious. If a party is required to do an act, he has to exert energy and time and effort to comply with the order. The reality of punitive sanctions being imposed will no doubt jolt the recalcitrant to immediate action and it is with this in mind that the indorsement of punitive sanction becomes a mandatory requirement. It is my judgment that the requirement for a penal notice will only apply where the judgment or order on which the committal proceedings are launched, is a positive order in the sense that it requires a person to do some act. On the other hand, where the order is prohibitory, that is, where the order directs a defendant not to do an act, the absence of the penal notice in the order is not fatal so long as the court is satisfied that the party restrained has notice.

[38] *Plastech Industrial Systems* involved the court dispensing with personal service of the order on which committal proceedings were commenced as the defendant had notice of the terms of the order. It did not involve dispensing with a penal notice.

[39] Fourthly, the purpose of penal notice is to warn a defendant of the consequences of non-compliance with the terms of the order or judgment against him. Even though the defendant was present in court when the consent judgment was drawn up and pronounced, that consent judgment was not endorsed with any notice under O. 45 r. 7(4) of the Rules. While she certainly knew the terms of the consent judgment, there was no evidence that she knew of or had been given any written notice of the consequences of non-compliance with the terms of the order or judgment. Nor did the plaintiffs or their solicitors insist on including a penal notice in the consent judgment when it was negotiated, agreed upon, drawn up, pronounced in court, and then sealed.

[40] Prior to filing the application under O. 52 r. 3 of the Rules for leave to make an application for an order of committal against the defendant, the plaintiffs' solicitors had on one occasion by letter dated 13 February 2023 written to the defendant's solicitors on the defendant's alleged non-compliance with the consent judgment. That letter ended by saying:

> In view of the above, our clients reserve their rights in taking any appropriate action or avenue against your client whereupon the relevant costs incurred shall be borne by your client.

Around six weeks later, the plaintiffs filed that application.

[41] In effect, the defendant has never been given any notice that, if she neglects to obey the consent judgment, she would be liable to process of execution for the purpose of compelling her to, including committal proceedings. The plaintiffs have never given her notice of their intention to institute committal proceedings against her.

[42] Lastly, though the plaintiff has urged this court to invoke its inherent powers under O. 92 r. 4 of the Rules to dispense with the penal notice, I am of the view that I cannot and should not do so.

[43] Order 92 r. 4 of the Rules provides:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[44] I am of the view that I cannot exercise that inherent power, for two main reasons.

[45] Firstly, the inherent powers of the court should only be invoked where there is a *lacuna* in the rules. In *Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd* [1996] 2 BLJ 142; [1996] 2 MLJ 334, VC George J said:

> However, where there is a lacuna in the rules and practice, then and only then, may the aforesaid inherent jurisdiction be invoked.

[46] Thus, conversely, where there is no *lacuna* in the Rules and the Rules contain provisions for a given scenario, the court will not invoke its inherent jurisdiction.

[47] In *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244; [1988] 1 MLJ 178, Syed Agil Barakbah FJ said:

> Order 92 r. 4 R.H.C. provides:
>
> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.
>
> We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or any abuse of its own process. It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.

[48] In my view, there is no *lacuna* here. The provisions of the Rules that I have mentioned above only allow dispensation of service of a judgment or order provided that the particular circumstances are met, but not the endorsement of a penal under O. 45 r. 7(4).

[49] In *Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd*, VC George J also said:

> The court has always had an inherent jurisdiction to regulate its own proceedings. Order 92 r. 4 of the Rules of the High Court 1980 recognizes this to be the position.
>
> However, that is not to mean that the judge may ignore express rules of court and make his own rules of practice and procedure inconsistent with written rules and time-honoured practices. There is no doubt that from time to time, established rules and practices become outdated. For instance, there are rules and practices that make for extended trials. Some of these rules and practices could perhaps be done away with or at least streamlined. New rules could be brought in.
>
> However, it is not open to individual judges or even for the conference of judges to take it upon himself or itself to do away with or streamline or adopt innovative procedures. However well-intentioned, that sort of

> thing, if permitted, could lead to a form of anarchy! If changes are called for, what has to be done is to have the rules committee – the members of which are carefully selected from the Bench and from members of the Bar and includes the Attorney General or his representative and which is headed by none other than the Chief Justice – give due consideration to the new ideas and have the rules duly amended. And until such amendments are effected, the old rules and practices cannot be ignored and new procedures may not be implemented. However, where there is a lacuna in the rules and practice, then and only then, may the aforesaid inherent jurisdiction be invoked.

[50] Likewise, in the Singapore case of *Samsung Corp v. Chinese Chamber Realty Pte Ltd* [2004] 1 SLR (R) 382, Chao Hick Tin JA said:

> We endorse the views of the judge that generally where the Rules of Court have expressly provided what can or cannot be done in a certain circumstance, it is not for the court to override the clear provision in exercise of its inherent powers.
>
> No court should arrogate unto itself a power to act contrary to the Rules. The rule making powers are conferred upon the Rules Committee. The court should not usurp the powers and functions of the Rules Committee:
>
> See *The Siskina* [1979] AC 210. If, in its opinion, what is clearly provided in a particular rule is undesirable or unjust, the course which the court should take would be to offer its views on it for the consideration of the Rules Committee but not to amend it, or bend it, to reflect what it thinks is just or more desirable.

[51] Consequently, I find that the penal notice is mandatory and cannot be dispensed with for judgments or orders requiring an act to be done.

[52] As the consent judgment did require the defendant to do a positive act but did not contain any penal notice, the consent judgment could not be enforced by way of committal for as long as it did not contain a penal notice. Thus, the leave order should not have been made and is liable to be set aside.

Affidavits In Committal Proceedings By Counsel For The Plaintiff

[53] The leave order resulted from an application the plaintiff filed under O. 52 r. 3 of the Rules, which provides:

> (1) No application to a court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.
>
> (2) An application for such leave must be made *ex parte* to the court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

[54] The purpose of the affidavit under O. 52 r. 3 of the Rules is therefore to verify the facts relied on.

[55] As O. 52 of the Rules does not contain any stipulations on the affidavits filed pursuant to its provisions. The provisions of O. 41 of the Rules, on "affidavits" should therefore be looked at.

[56] Order 41 r. 5(1) provides:

> Subject to O. 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under O. 38, r. 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

[57] In *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* [1985] 1 CLJ 181; [1985] CLJ (Rep) 575, Shankar J (as he was then) said:

> A second point which needs to be emphasized is that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence.

[58] In *Pacific Inter-Link Sdn Bhd v. Pemilik Kapal Atau Vesel "Makatsarija"* [2000] 2 CLJ 679; [1999] MLJU 721, a preliminary objection was upheld against an affidavit deposed to by counsel for the defendant for its application to stay the proceedings and, without any supportive affidavit, the application was dismissed.

[59] Given the serious nature and consequences of committal proceedings and that the affidavit filed under O. 52 r. 3 of the Rules is for the deponent to verify facts which he is able of his own knowledge prove, I find that the plaintiff's counsel should not have affirmed the counsel's affidavits in support of the leave application. That task should have been left to the plaintiffs themselves, more so when the alleged non-compliance with the consent judgment took place in Penang, and was for putting up a signage continuously twelve months.

[60] Given that the signage under the signage terms was to be displayed at the defendant's restaurant in Penang, whether or not the defendant had complied with that was something that the plaintiffs had to depose to and verify, not their counsel.

[61] Furthermore, under O. 38 r. 2 of the Rules, a deponent of an affidavit may be cross-examined on that affidavit. That possibility is a further reason for counsel and solicitors for the party not to affirm contentious affidavits on behalf of their clients.

[62] Having said that, I find that the matter of the plaintiffs' counsel signing the counsel's affidavits alone would not be fatal to the leave application or to the leave order. The pivotal question still remains, *ie*, as to whether or not

the defendant did or did not breach the consent judgment is something that was supposed to have been be determined at the hearing of the committal application, if it had proceeded to that.

Conclusion

[63] Having found in favour of the defendant that the absence of any penal notice on the consent judgment was fatal to any committal proceedings, I therefore allowed the defendant's application to set aside the leave order.

[64] In setting aside the leave order, I further make the consequential order that the committal application be struck out, with liberty to file afresh.

[65] As for costs I order that the plaintiffs to pay costs of RM8,000 to the defendant, subject to allocator, for both the defendant's application and the committal application.